In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 71-1486

GEORGE M. HART, d/b/a SAN DIEGO CABINETS, ET AL., PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. C) is reported at 453 F. 2d 215. The Board's decision and order (Pet. App. A and B) are reported at 183 NLRB No. 100.

JURISDICTION

The judgment of the court of appeals was entered on February 14, 1972 (Pet. App. D, D-1 to D-5).

The petition for a writ of certiorari was filed on May 13, 1972. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, on the facts of this case, the Board properly found that the union had not consented to bargain with certain employers in a multi-employer, multi-union bargaining unit, and thus that those employers, by refusing to bargain with the union on an individual basis, violated Section 8(a)(5) and (1) of the National Labor Relations Act.

STATUTE INVOLVED

The relevant provisions of Sections 8(a) and 9(a) of the National Labor Relations Act, 29 U.S.C. 158 (a) and 159(a) are as follows:

> Sec. 8(a). It shall be an unfair labor practice for an employer—
>
> (1) to interfere with, restrain, or coerce employees in the exercise of the rights [to bargain collectively, etc.]; * * *
>
> (5) to refuse to bargain collectively with the representatives of his employees * * *.
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> * * * *
>
> Sec. 9(a). Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclu-

> sive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment * * *.

STATEMENT

Petitioners are engaged in the manufacture and installation of kitchen and bathroom cabinets in Southern California and they employ members of Local 2020, United Brotherhood of Carpenters and Joiners of America, AFL-CIO ("Local 2020"). The pattern of bargaining in the San Diego area has long been for Local 2020 to negotiate an agreement with the San Diego Lumbermen's Association ("Lumbermen's Association"), a multi-employer association with which petitioners are not affiliated, and, thereafter, to engage in separate negotiations with each of some fifty independent employers, including petitioners. Local 2020's agreements with the independent employers normally have contained terms similar to those in the Lumbermen's Association contract (Pet. App. A, A-8; Tr. 10-16, 31-34).[1]

In 1966, Local 2020 and Lumbermen's Association negotiated a three-year contract which expired on

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[1] "Tr." references are to the transcript of proceedings before the Board. "G.C. Exh.," "Resp. Exh.," and "C.P. Exh." are to the exhibits introduced in that proceeding by the General Counsel, the Respondents, and the Charging Party, respectively.

July 31, 1969 (Pet. App. A, A-8 to A-9; Resp. Exh. 7; Tr. 58-60). Petitioners and other independent employers subsequently negotiated and executed separate and individual contracts with Local 2020 covering the same period and having similar terms (Pet. App. A, A-9 to A-10; G.C.Exh. 2 & 3; Tr. 10-15).[2] On May 29, 1969, pursuant to the various contracts, Local 2020 served written notices upon Lumbermen's Association and each of the independent employers, including petitioners, stating that Local 2020 desired to reopen the contracts.

Negotiations between Lumbermen's Association and Local 2020 were held from June 20 through July 30, 1969, when the union's membership, including petitioners' employees, voted to accept Lumbermen's Association's "final offer" (Pet. App. A, A-12 to A-13; Tr. 21-22, 28-29). The financial secretary of Local 2020 then wrote each of the independent employers, including petitioners, informing them that their individual contracts expired on July 31 and that Local 2020 desired a meeting on August 2 to negotiate new individual agreements (Pet. App. A, A-13; Tr. 19-20; G.C. Exh. 6).

In late July 1969, petitioners applied for membership in the Southern California Association of Cabinet Manufacturers ("Southern California Association"), a multi-employer bargaining association (Pet.

[2] Two of the petitioners, Ronald H. Sandoval and C.A. Homes, did not sign contracts for the 1966-1969 term, but they did comply with the terms and conditions of the contracts signed by the other petitioners.

App. A, A-15, n. 7; Resp. Exhs. 11(a) to 11(i)). Southern California Association was signatory to a Master Labor Agreement with the Twelve Southern California Counties Mill Conference ("the Conference"), a multi-union bargaining group of which Local 2020 was a member prior to March 31, 1969 (Pet. App. A, A-13 to A-15; Resp. Exh. 4).[3] The agreement between Southern California Association and the Conference provided that "[a]ll Employers who are or who become members of the Southern California Association * * * are parties to this Agreement and are entitled to the benefits and subject to the obligations hereof * * *" (Pet. App. A, A-16, n. 8; Resp. Exh. 4, p. 3).

On July 30, 1969, the Executive Vice President of Southern California Association sent letters to the Chairman of the Conference and to Local 2020, stating that the petitioners had become members of the Southern California Association and were covered by the Master Labor Agreement (Pet. App. A, A-13 to A-14; Resp. Exh. 3). The following day, petitioner Cross sent a telegram to Local 2020 stating that, since petitioners were now members of the Southern California Association, they would not meet with

[3] When Local 2020 began to prepare its proposals for the 1969 negotiations with Lumbermen's Association and the independent employers, it decided to withdraw from the Conference, which it did during March 1969. At that time, no employer having bargaining relations with Local 2020 was a member of Southern California Association (Pet. App. A, A-14 to A-15, n. 6; Tr. 87-88, 93, 104-105, 109-112, 115-118, 126; C.P. Exhs. 1, 2; Resp. Exh. 10).

Local 2020 on August 2, and that the provisions of the Master Labor Agreement would become effective between them and Local 2020 as of August 1 (Pet. App. A, A-15 to A-16; Resp. Exh. 5(a) and (b)).

On August 2, the independent employers who did meet with Local 2020 signed "Interim Independent Mill & Cabinet Agreements" patterned after the contract between the union and Lumbermen's Association (Pet. App. A, A-17; Tr. 22; G. C. Exh. 7). As the meeting was closing, petitioner Charles A. Homes appeared as agent for petitioners; he signed an Interim Agreement on their behalf and presented it to the union representative, along with another document stating that petitioners had signed the Interim Agreement "under protest" (Pet. App. A, A-18; Tr. 25, 62-64; G. C. Exh. 8). The union representative advised Homes that Local 2020 would accept his execution of an Interim Agreement on behalf of petitioners only with the understanding that he was binding each as a separate, independent employer; Homes refused to sign on that basis (Pet. App. A, A-18; Tr. 70). Thereafter, following a strike against petitioners by Local 2020, each petitioner individually signed an Interim Agreement "under protest" but has refused to negotiate a complete contract (Pet. App. A, A-18 to A-19; Tr. 79, 133-134; Resp. Exh. 6; C.P. Exh. 3). Local 2020 subsequently filed unfair labor practice charges against petitioners.

The Board found that "there is neither a history of multi-employer bargaining nor express agreement between the [petitioners] and Local 2020 for multi-

employer bargaining" (Pet. App. A, A-23); that petitioners' attempts to establish a multi-employer bargaining unit were untimely since they came after the contract renewal notices had been sent out by Local 2020 (Pet. App. A, A-27); and that, therefore, petitioners violated Section 8(a)(5) and (1) of the Act by refusing to bargain on an individual basis with Local 2020 (Pet. App. A, A-33). The Board ordered petitioners to cease and desist from the unfair labor practices found and to bargain collectively with Local 2020 upon request (Pet. App. A, A-34 to A-35; Pet. App. B, B-3). The court of appeals enforced the Board's order (Pet. App. C, D).

ARGUMENT

1. Petitioner's basic contention (Pet. 10-18) is that the court of appeals erred in looking only to the prior practice of the parties and not to whether Local 2020 had, by virtue of its membership in the Conference at the time the Master Labor Agreement was executed, consented to bargain with petitioners in the Southern California Association unit. However, the court expressly upheld "the Board's finding that Local 2020 had neither *practised* nor *consented* to multi-employer bargaining alone" (Pet. App. C, C-10) (emphasis in the original). Thus, contrary to petitioners' contention, the court was not holding "that a union is not bound to continue participating in group * * * bargaining if there has been no 'practice' of group bargaining" (Pet. 14-15). The court applied the same test employed by

other courts of appeals, *i.e.*, whether both the union and the employers have indicated "an unequivocal intention to be bound in collective bargaining by group rather than individual action" (Pet. App. C, C-6). See *e.g.*, *Western States Regional Council No. 3, Woodworkers* v. *National Labor Relations Board*, 398 F. 2d 770 (C.A. D.C.); *National Labor Relations Board* v. *Bagel Bakers Council of Greater New York*, 434 F. 2d 884 (C.A. 2), certiorari denied, 402 U.S. 908. In so doing, it investigated not only "practice"—the history of the dealings between the parties—but also "consent"—the intent of the parties.

2. Accordingly, the only question here presented is whether substantial evidence supports the Board's finding that Local 2020 never consented to bargain with petitioners on a multi-employer basis. This factual issue does not warrant further review.

In any event, the Board's finding is amply supported. Local 2020 had always bargained with petitioners on an individual basis and had consistently opposed bargaining with them in a multi-employer unit. Furthermore, the terms of the Master Labor Agreement did not constitute express consent by Local 2020 to bargaining with a multi-employer unit embracing petitioners: neither Local 2020 nor any of the petitioners had engaged in the bargaining that led to the agreement, none of the employers Local 2020 bargained with were members of Southern California Association, and Local 2020 had completely severed its affiliation with the Conference four

months before petitioners joined Southern California Association. Moreover, even if the union's participation in the Conference had implied consent to bargaining with petitioners in a muti-employer unit, petitioners' unilateral efforts to create such a unit were untimely, for they occurred after the "pattern" contract with Lumbermen's Association had been negotiated. See *Detroit Newspaper Publishers Ass'n* v. *National Labor Relations Board*, 372 F. 2d 569 (C.A. 6); *Publishers' Ass'n of New York City* v. *National Labor Relations Board*, 364 F. 2d 293 (C.A. 2), certiorari denied, 385 U.S. 971.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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